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No. 75-1765

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES EDWARD RIEBSCHLAEGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in refusing to suppress certain evidence used against him, and that the jury that tried him was not impartial.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner and co-defendant Ruben Cortez Alaniz were convicted of possession of marihuana with intent to distribute and of conspiracy to possess marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to four years' imprisonment and a special parole term of three years on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 16-17).

On May 21, 1973, Customs Agent Charles Miller received information from employees of Coastal Bend

Flying Service in Robstown, Texas, that petitioner, a commercial pilot, had recently rented one of their aircraft and flown it to a destination in the opposite direction from that in which he had stated he was going (A. 1-2).[1] Agent Miller thereupon checked Customs Service files and found a report by another agent who had previously inspected a plane rented by petitioner that he had detected the odor of marihuana therein (A. 23, 26-27).

On May 29, 1973, Coastal Bend advised Agent Miller that petitioner had rented another of their planes. Miller asked that the craft be held for his inspection; inside he found what he believed to be several marihuana seeds and a few pieces of marihuana leaves (A. 4-5, 31-32).

Agent Miller next learned that petitioner had arranged to rent a plane from Coastal Bend to fly to Mexico on June 5, 1973 (A. 6-7). Miller arranged for both air and ground surveillance of the plane (*ibid.*). On that date petitioner flew first from Robstown to Kingsville, Texas, for a stop of approximately ten minutes. From Kingsville he flew to Harlingen, Texas, where he stayed for about thirty minutes and was seen with co-defendant Alaniz (whom he appeared to have picked up in Kingsville). Both men made telephone calls from a booth in the Harlingen airport (A. 7-8, 41-45). From Harlingen the men flew to Weslaco, Texas, where an automobile met the plane (A. 9). From Weslaco they flew back to Kingsville, landed, and parked in an area away from the location normally used by transient aircraft (A. 10).

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[1]Citations are to the appendix filed with the court of appeals.

Alaniz then left the aircraft, withdrew a large suitbag from its rear compartment, and began running toward a brushy area nearby (A. 11, 51). The agents then identified themselves. Alaniz dropped the bag and ran back to the airplane, where he locked himself inside with petitioner (A. 12, 56-57). The agents called for the men to come out, but they did so only after one of the agents, seeing Alaniz reach under the seat, fired a warning shot into the plane. The two men were thereupon arrested (A. 13-14). The bag Alaniz had dropped was found to contain marihuana (A. 14).

1. Petitioner contends (Pet. 9-13) that the Customs agents lacked probable cause to arrest him and Alaniz and that the seizure and search of the bag of marihuana was therefore invalid.

But the bag of marihuana was not seized pursuant to an arrest. When Alaniz dropped the bag, returned to the aircraft, and locked himself inside, he abandoned the contraband. It is well-settled that a seizure of abandoned property does not violate the Fourth Amendment. *Abel* v. *United States*, 362 U.S. 217, 241; *Hester* v. *United States*, 265 U.S. 57, 58; *United States* v. *Colbert*, 474 F. 2d 174, 176 (C.A. 5) (*en banc*); *United States* v. *Martin*, 386 F. 2d 213 (C.A. 3), certiorari denied, 393 U.S. 862.[2]

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[2]We note further that nothing in the record indicates that petitioner had any continuing possessory interest in the marihuana sufficient to give him standing to contest the validity of the agent's conduct here. *Brown* v. *United States*, 411 U.S. 223; *Alderman* v. *United States*, 394 U.S. 165. Although a possessory offense is charged, we believe that the doctrine of "automatic standing" should be rejected and that standing to assert a claim for suppression of evidence should be contingent upon a showing that the challenged search or seizure violated the rights

Moreover, contrary to petitioner's assertion, the arrest was based on probable cause. The facts as recounted above were competent "to warrant a prudent man in believing that the petitioner had committed or was committing an offense" (*Beck* v. *Ohio*, 379 U.S. 89, 91). Even assuming, however, that the facts known to the agents when petitioner landed in Kingsville did not give rise to probable cause to arrest at that time, Alaniz' suspicious conduct when the agents made their presence known to him was sufficient to supply the probable cause necessary to arrest both petitioner and Alaniz.

2. Prior to trial, petitioner moved to quash the jury array, arguing that 24 of the prospective jurors had already served on two prior juries that had returned guilty verdicts (12 had returned such a verdict in an unrelated case involving petitioner's attorney) and that these jurors were therefore necessarily biased against him, in derogation of his Sixth Amendment right to an impartial jury (Pet. 7-8, 13-15). The district court denied the motion, and the court of appeals correctly affirmed. Absent a showing of actual bias (none was shown here) no juror need be disqualified merely because he or she sat on other juries, even when the cases arose out of similar facts or involved some of the same government witnesses. *Government of the Virgin Islands* v. *Williams*, 476 F. 2d 771 (C.A. 3); *United States* v. *Williams*, 484 F. 2d 176 (C.A. 8), certiorari denied, 414 U.S. 1070; *Casias* v. *United States*, 315 F. 2d 614 (C.A. 10),

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of the defendant. In this case petitioner had no legitimate interest in the contraband at the time the bag was seized and searched, and his previous possession of it therefore cannot be a basis of standing.

certiorari denied, 374 U.S. 845; *United States* v. *DeMet*, 486 F. 2d 816 (C.A. 7), certiorari denied, 416 U.S. 969.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[3]The trial judge conducted an extensive *voir dire* of prospective jurors (A. 79-103) and specifically inquired whether prior jury service would prevent any of them from rendering an impartial verdict in this case (A. 91-92).